

² The Board notes that, following the issuance of the September 12, 2011 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. See 20 C.F.R. § 501.2(c)(1).

March 12, 2011; and (2) whether it properly determined that appellant was at fault in the creation of the overpayment and not entitled to waiver of recovery.

On appeal, appellant contends that he was without fault in creating the overpayment because OWCP was informed that he had returned to work and should be taken off of the periodic rolls. He further contends that he did not receive OWCP's preliminary overpayment determination and would suffer financial hardship due to recovery of the overpayment.

FACTUAL HISTORY

OWCP accepted that appellant, then a 29-year-old firefighter, sustained a right knee meniscus tear during physical fitness training in the performance of duty on November 4, 2010. It advised him that any portion of a payment made for a period that he had worked without wage loss would be reclaimed and/or considered an overpayment. Appellant underwent a right knee arthroscopy on December 4, 2010.

On January 27, 2011 the employing establishment notified OWCP by telephone that appellant was released to work as of February 25, 2011. The memorandum noted that he was on the periodic rolls and OWCP would remove him beginning with the period of February 13, 2011.

On February 15, 2011 appellant filed a claim for leave without pay for the period February 13 to 22, 2011. He returned to light-duty work on February 28, 2011.

On March 8, 2011 appellant filed a claim for compensation for wage loss for the period February 28 to March 11, 2011 and a claim for 20 hours of leave without pay for attending physical therapy from February 28 to March 10, 2011.

Appellant received a check dated March 12, 2011 in the amount of \$3,984.25 by direct deposit for temporary total disability for the period February 13 through March 12, 2011.

On March 28, 2011 appellant filed a claim for "Extra Pay" and cost-of-living allowance (COLA).

In a May 2, 2011 telephone memorandum, the employing establishment notified OWCP that the correct amount of hours of leave without pay for March 10, 2011 was 3.5 hours, not 4 hours. This correction resulted in a total of 19.5 hours of leave without pay claimed by appellant.

In another May 2, 2011 telephone memorandum, OWCP noted that according to the employing establishment appellant was only receiving base pay and COLA while he was working light duty.

On May 10, 2011 the employing establishment sent OWCP records of appellant's leave and earnings statements. On May 12 and 16, 2011 it informed OWCP that when appellant returned to work he was working 80 hours per pay period instead of the usual 144 hours per pay period and was not receiving the "Extra Pay" he would normally have been entitled to.

OWCP completed an overpayment worksheet and determined that appellant received an overpayment of compensation in the amount of \$930.17 for the period February 13 to March 12, 2011. Appellant was placed on the periodic rolls and returned to light-duty part-time work on February 28, 2011. He was paid for total disability on the periodic rolls through March 12, 2011. When appellant returned to work, he was working 40 hours per week instead of the usual 144 hours per pay period and was not receiving the “Extra Pay” he would normally have been entitled to. He only received his base pay and COLA. Further, appellant claimed 19.5 hours of leave without pay for lost time due to medical appointments for the period February 28 to March 12, 2011. OWCP subtracted the \$2,134.42 due for temporary total disability for the period February 13 to 27, 2011, the \$563.18 due for loss of “Extra Pay” for the period February 28 to March 12, 2011 and the \$356.48 due for 19.5 hours of leave without pay from the \$3,984.25 paid *via* periodic rolls and found that he had received a total overpayment of \$930.17.³

On July 22, 2011 OWCP notified appellant of its preliminary determination that he received an overpayment of compensation from February 28 through March 12, 2011, in the amount of \$930.17 because he returned to work while on the periodic rolls. It notified him of its preliminary determination that he was at fault in the creation of the overpayment because he accepted a payment that he knew or reasonably should have known was incorrect.

Subsequently, appellant submitted reports by Dr. Calvin S. Oishi, a Board-certified orthopedic surgeon, dated June 24 and August 1, 2011.

By decision dated September 12, 2011, OWCP finalized its determination that appellant received an overpayment of compensation in the amount of \$930.17 for the period February 13 through March 12, 2011⁴ because he received compensation for temporary total disability while working. It further finalized its determination that he was at fault in the creation of the overpayment and therefore not entitled to waiver of recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 1

FECA⁵ provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁶ Section 8129(a) of FECA provides that, when an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by OWCP, by decreasing later payments to which the individual is entitled.⁷

³ On June 29, 2011 OWCP found an overpayment for the period December 20, 2010 to March 12, 2011 in the amount of \$26.40 due to an error in the pay rate. This was administratively terminated on June 30, 2011.

⁴ OWCP's September 12, 2011 decision identifies the period as February 13 to 27, 2011; however, the Board finds that this is harmless error as the July 22, 2011 preliminary determination by OWCP indicates that the period of overpayment in question is February 13 through March 12, 2011 in the same amount of \$930.17.

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *Id.* at § 8102(a).

⁷ *Id.* at § 8129.

ANALYSIS -- ISSUE 1

The record establishes that appellant returned to part-time employment on February 28, 2011 but received compensation for temporary total disability on the periodic rolls through March 12, 2011. OWCP records show that he received a check dated March 12, 2011 for the period February 13 through March 12, 2011 in the amount of \$3,984.25. In calculating the overpayment, it determined that appellant had received an overpayment in the amount of \$930.17. OWCP found that, when he returned to work, he was working 40 hours per week instead of the usual 144 hours per pay period and was not receiving the “Extra Pay” to which he would normally have been entitled from February 28 through March 12, 2011. Appellant only received his base pay and COLA. He also claimed 19.5 hours of leave without pay for lost time due to medical appointments for the period February 28 through March 12, 2011. OWCP found that appellant was paid total temporary disability under the periodic rolls from February 13 through March 12, 2011 in the amount of \$3,984.25, was due \$2,134.42 for temporary total disability from February 13 to 27, 2011, \$563.18 for loss of “Extra Pay” and \$356.48 for 19.5 hours of leave without pay and concluded that the total amount of the overpayment was \$930.17. Appellant has not submitted any evidence contesting the fact and amount of overpayment. The Board finds that OWCP properly determined that he received an overpayment of compensation in the amount of \$930.17.

On appeal, appellant contends that he did not receive OWCP’s preliminary determination. The record establishes that OWCP sent the July 22, 2011 decision to his last known address of record⁸ and that the decision was not returned to OWCP. The presumption is that the decision was received as under the “mailbox rule” it was mailed in the normal course of business to the last known address of record.⁹ Thus, the Board finds that appellant’s argument is unsubstantiated.

LEGAL PRECEDENT -- ISSUE 2

Under section 8129 of FECA and its implementing regulations, an overpayment must be recovered unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.¹⁰ Section 10.433 of the implementing regulations provide that OWCP may consider waiving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.¹¹ The regulations further provide that each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper.¹² Under the regulations, a recipient will be found to be at fault with respect to creating an overpayment if he or she accepted a payment which he or

⁸ 20 C.F.R. § 10.127. “A copy of the decision shall be mailed to the employee’s last known address.”

⁹ See *Kenneth E. Harris*, 54 ECAB 502 (2003).

¹⁰ 20 C.F.R. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

¹¹ *Id.* at § 10.433(a).

¹² *Id.*

she knew or should have known to be incorrect.¹³ Whether OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment.¹⁴

ANALYSIS -- ISSUE 2

In finding appellant at fault in the creation of the \$930.17 overpayment, OWCP found that he knew or should have known the payments he received by direct deposit after his return to work on February 28 through March 12, 2011 were incorrect.

Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives are proper¹⁵ and the recipient must show good faith and exercise a high degree of care in reporting events that may affect entitlement to or the amount of benefits.¹⁶ Even though OWCP may have been negligent in making incorrect payments, this does not excuse a claimant from accepting payments he or she knew or should have known to be incorrect.¹⁷ The Board has found the claimant to be at fault in cases where he or she is receiving compensation checks through direct deposit which involve a series of payments over several months with clear knowledge that the payments are incorrect.¹⁸ It is not appropriate, however, to make a finding that a claimant has accepted an overpayment *via* direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred.¹⁹ This awareness may be established either through documentation such as a bank statement or notification from OWCP or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment.²⁰

Appellant returned to work on February 28, 2011. Subsequently, OWCP paid him compensation for the period February 13 through March 12, 2011 in the amount of \$3,984.25. Since its regulations define fault by what the claimant knew or should have known at the time of acceptance, one of the consequences of electronic fund transfers is that in many cases the claimant will not be at fault for accepting the first incorrect payment because the requisite knowledge is lacking at the time of deposit. A finding of no fault does not mean, however, that the claimant may keep the money, only that OWCP must consider eligibility for waiver for this period. The record in this case shows that appellant received a compensation payment by direct deposit for the period February 13 through March 12, 2011. The case will therefore be remanded

¹³ *Id.* at § 10.433(a)(3). See *Tammy Craven*, 57 ECAB 589 (2006).

¹⁴ *Id.* at § 10.433(b). See *Neill D. Dewald*, 57 ECAB 451 (2006).

¹⁵ See *Danny E. Haley*, 56 ECAB 393 (2005).

¹⁶ See *Sinclair L. Taylor*, 52 ECAB 227 (2001).

¹⁷ See *William E. McCarty*, 54 ECAB 525 (2003).

¹⁸ See *Karen K. Dixon*, 56 ECAB 145 (2004).

¹⁹ See *S.H.*, Docket No. 10-499 (issued November 29, 2010).

²⁰ See *K.H.*, Docket No. 06-191 (issued October 30, 2006).

for OWCP to determine whether he is entitled to waiver of recovery of the overpayment for compensation paid after his return to work on February 28, 2011.

CONCLUSION

The Board finds that OWCP properly determined that an overpayment in compensation in the amount of \$930.17 had been created for the period February 13 through March 12, 2011. However, the Board further finds that appellant was not at fault in the creation of the overpayment. The case is remanded for a determination of whether he is entitled to waiver of recovery of the overpayment for that part of compensation paid after his return to work on February 28, 2011.

ORDER

IT IS HEREBY ORDERED THAT the September 12, 2011 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision.

Issued: November 13, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board